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March 12, 1998

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37238

Re: Application of the Electric Power Board of Chattanooga
for a Certificate of Public Convenience and Necessity
to Provide Intrastate Telecommunication Services --
Docket No. 97-07488

Dear David:

We are enclosing the original and thirteen (13) copies of
the Brief filed in behalf of Electric Power Board of Chattanooga
in the above-captioned matter.

Sincerely yours,



William C. Carriger
For the Firm

WCC/as
Enclosures
cc: Parties of Record
78351

BEFORE THE
TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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IN RE:

APPLICATION OF ELECTRIC)
POWER BOARD OF CHATTANOOGA)
FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY)
TO PROVIDE INTRASTATE)
TELECOMMUNICATIONS SERVICES)

OFFICE OF THE
EXECUTIVE SECRETARY
Docket No. 97-07488

PRE-HEARING BRIEF
OF THE ELECTRIC POWER BOARD OF CHATTANOOGA

This Pre-Hearing Brief is submitted on behalf of the Electric Power Board of Chattanooga ("Electric Power Board") in support of its Application filed on October 21, 1997, for a Certificate of Public Convenience and Necessity to become a competing telecommunications service provider (the "Application").

INTRODUCTION

On January 28, 1998, Tennessee Regulatory Authority General Counsel, Dennis P. McNamee, appointed to serve as Hearing Officer for this proceeding, submitted the Report and Recommendation of Hearing Officer From the Pre-Hearing Conference Held December 29, 1997 (the "Report and Recommendation"). After he received suggested issues from the parties, the Hearing Officer, in his Report and Recommendation, set forth a statement of issues and established a discovery schedule and hearing date for the Application. At its February 17, 1998, Agenda Conference, the Tennessee Regulatory Authority adopted the Report and Recommendation.

Several of the issues involve legal issues; accordingly, the Hearing Officer provided for a briefing schedule for the parties to discuss those issues. The Electric Power Board will comment on

what it contends are non-standard issues and are not usually considered in an Application for a Certificate of Convenience and Necessity.

BACKGROUND

As the Directors well know, at the beginning of Tennessee Public Acts of 1995, Chapter No. 408 (for convenience referred to herein as the "Telecommunications Act of 1995"), the Tennessee Legislature adopted a telecommunications policy which stated in part:

The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets

Tennessee Code Annotated § 65-4-123.

The Tennessee Regulatory Authority has spent considerable time and effort in implementing this policy, including receiving, hearing, and approving numerous Applications for Certificates of Convenience and Necessity by competing telecommunications service providers.

Another significant pronouncement relevant to this proceeding was made in 1997, when the Tennessee Legislature authorized municipal electric systems to offer telecommunications services with the enactment of Public Chapter 531 as codified in Tennessee Code Annotated § 7-52-401, et seq., (which will be referred to for convenience as the "Municipal Electric Act of 1997"). The Legislature, in enacting the Municipal Electric Act of 1997, stated in relevant part:

[T]o the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee Regulatory [A]uthority in the same manner and to the same extent as other certificated providers of telecommunications services, including without limitation rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality's provision of telephone, telegraph and communication services.

Tennessee Code Annotated § 7-52-401.

In the subsequent sections of the Municipal Electric Act of 1997, the Legislature proscribed specific rules and guidance for the municipal electric systems, but did not authorize the Tennessee Regulatory Authority to adopt or impose new or additional regulations.

The Electric Power Board, wishing to offer telecommunications services to its customers, has filed the instant Application pursuant to § 7-52-401.

- A. The Electric Power Board of Chattanooga is not Subject to the Provisions of Tennessee Code Annotated § 65-5-208(c) Because it is Not an Incumbent Local Exchange Carrier.

The first issue adopted by the Hearing Officer, one suggested by the intervenors, was whether the Electric Power Board must first demonstrate that it will comply with Tennessee Code Annotated § 65-5-208(c) concerning cross-subsidization. The plain language of Tennessee Code Annotated § 65-5-208(c), which is a part of the Telecommunications Act of 1995, indicates that the regulation provided under this subsection applies to incumbent local exchange telephone companies:

(c) Effective January 1, 1996, an incumbent local exchange telephone company shall adhere to a price floor for its competitive services subject to such determination as the authority shall make pursuant to § 65-5-207. The price floor shall equal the incumbent local exchange telephone company's tariffed rates for essential elements utilized by competing telecommunications service providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor. The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.

Tennessee Code Annotated § 65-5-208(c).

Because the Electric Power Board is not an incumbent local exchange telephone company, as the term is defined in Tennessee Code Annotated § 65-4-101(d), this subsection (c) does not apply to the Electric Power Board.

Incumbent local exchange telephone companies are referred to throughout this subsection. Nowhere in Section 65-5-208 is there any indication that this subsection (c) applies to anyone other than incumbent local exchange telephone companies. Reading the last sentence of subsection (c) by itself may suggest that it applies to others, but to do so would be contrary to the long-established rule of statutory construction holding that the intent of the Legislature is to be found in the context. This rule of statutory construction is illustrated by examples of such decisions over the years:

Words necessary to express the intention of the Legislature in making a law cannot always be embraced in a sentence, a paragraph, or a section of the Statute, hence the reason for looking beyond the literal meaning of detached sentences, paragraphs, and sections, and viewing the context, and drawing from the whole inferences through which the intention may be ascertained

Jellicorse v. Russell, 156 Tenn. 411, 413;
1 S.W.2d 1011 (1928).

It is not in accord with any rule of statutory construction to lift one sentence out from the statute and construe it alone, without reference to the balance of the statute

Cummings v. Sharp, 173 Tenn. 637, 643;
122 S.W.2d 423, 425 (1938).

A statute's meaning is to be determined not from special words in a single sentence or section, but from the act taken as a whole, viewing the legislation in light of its general purpose. [Citation omitted]

Pearson v. Hardy, 853 S.W.2d 495, 500
(Tenn. App. 1992).

Had the General Assembly intended to make the final sentence of subsection (c) of Section 65-5-208 applicable to all telecommunications service providers, it could have done so by express reference to all telecommunications service providers or it could have instead created a new subsection applicable to telecommunications service providers.

The language of the last sentence of subsection (c) supports the position of the Electric Power Board, because the authorization to adopt "other rules" clearly complements the previous regulatory authority granted to the Tennessee Regulatory Authority over incumbent local exchange telephone companies. Had the General Assembly intended to grant the Tennessee Regulatory Authority

additional authority that was unrelated to the regulatory authority given over incumbent local exchange telephone companies in the prior sentence, the word "other" in the last sentence would be unnecessary and superfluous. An authorization to adopt "rules" would have been sufficient to accomplish that result.

The Electric Power Board's reading of subsection (c) is consistent with the reading of the remainder of Tennessee Code Annotated § 65-5-208. In subsection (a), the General Assembly clearly provided that the definitions of "basic local exchange telephone services" and "non-basic services" relate to services of incumbent local exchange telephone companies that apply for price regulation under Tennessee Code Annotated § 65-5-209, which itself applies only to incumbent local exchange telephone companies. Additionally, in subsection (d), the General Assembly again referred to the "non-basic services" of incumbent local exchange telephone companies.

Although, according to the last sentence of subsection (c), cross-subsidization is one of the activities the Tennessee Regulatory Authority is to address in the rules to be promulgated, cross-subsidization by a municipal electric system establishing a telecommunications division is already controlled by Section 7-52-402 of the Municipal Electric Act of 1997, which prohibits cross-subsidization but allows the municipal electric system to dedicate a portion of the electric plant to its telecommunications division and to loan funds to the telecommunications division. This statutory conflict is easily reconciled by the fact that the General Assembly intended subsection (c) to apply only to incumbent local telephone companies.

Remembering that the legislative intent in 1995 by enacting the Telecommunications Act was to foster competition in the local telephone market and that the General Assembly's concern was the ability of the incumbent local telephone company to prevent competition through the activities listed in subsection (c), read in context with the rest of the section and with the intent of the Telecommunications Act of 1995 as a whole, the only interpretation of the last sentence of subsection (c) would be that it only applies to incumbent local exchange telephone companies.

In the alternative, the Electric Power Board submits that in the event that the Tennessee Regulatory Authority determines that one or more rules or orders relating to cross-subsidization do apply to Electric Power Board, then the demonstration of compliance required under the authority of Tennessee Code Annotated § 65-4-201(c) must be the same as are required for other applicants for the reasons discussed in Section B. below.

Variations of this issue reappear as subsidiary issues to the principal issues listed under III (d) Issues for Certification, and the same arguments apply to those subsidiary issues.

- B. The Electric Power Board of Chattanooga Should not be Required to Demonstrate Compliance with Tennessee Code Annotated § 7-52-401, et seq., Prior to Consideration of its Application.

For the second issue listed in his report, the Hearing Officer incorporated another issue suggested by the intervenors on whether the Electric Power Board should demonstrate compliance with the Municipal Electric Act of 1997 before the Tennessee Regulatory Authority considers the Electric Power Board's application. As shown by the relevant portion of Tennessee Code Annotated § 7-52-

401 quoted above, the Tennessee Legislature subjected municipal electric systems seeking to provide telecommunications services only to regulation in the same manner and to the same extent as the Tennessee Regulatory Authority regulates other certificated providers of telecommunications services. Accordingly, the Tennessee Regulatory Authority should treat the Electric Power Board like other applicants for a Certificate of Convenience and Necessity, and the Electric Power Board shall have the duties of a "public utility," but only to the extent necessary to effect such regulation. Accordingly, Electric Power Board, like other applicants for a Certificate of Convenience and Necessity, must show under Tennessee Code Annotated § 65-4-201(c) that it has sufficient managerial, financial, and technical abilities to provide the applied-for services and that it will adhere to the policies, rules, and orders of the Tennessee Regulatory Authority. Like other applicants, the Electric Power Board must also submit a small and minority-owned telecommunications business plan pursuant to Tennessee Code Annotated § 65-5-212. If the Electric Power Board does so, the Tennessee Regulatory Authority should grant the Electric Power Board's Application.

Prior to the enactment of the Municipal Electric Act of 1997, the Electric Power Board was wholly exempt from the regulatory authority of the Tennessee Regulatory Authority. *See* Tennessee Code Annotated § 65-4-101(a)(2) (defining "public utility" to exclude municipal systems). Although the Municipal Electric Act of 1997 subjects the telecommunications operations of the Electric Power Board to the regulatory authority of the Tennessee Regulatory

Authority as quoted above, that legislation clearly provides that the Electric Power Board is to be subject to regulation "in the same manner and to the same extent" as are other certificated providers of telecommunications services. Tennessee Code Annotated § 7-52-401.

Other than Section 7-52-401 quoted above and certain regulatory accounting issues in Sections 7-52-402, 7-52-404 and 7-52-405, the Municipal Electric Act of 1997 does not confer upon the Tennessee Regulatory Authority any additional authority to regulate the activities of the Electric Power Board. There is not even a hint of the concept that the Tennessee Regulatory Authority should pre-screen applications for compliance with the Municipal Electric Act of 1997. To do so would be in violation of § 7-52-401, and subject the Electric Power Board to additional requirements not being imposed upon other certificated providers of telecommunications. The Municipal Electric Act of 1997 does not authorize the Tennessee Regulatory Authority to impose additional regulatory requirements specifically on the Electric Power Board and other municipal electric systems that are not also applicable to other certificated providers of telecommunications services. The plain language of the statute admits of no other interpretation.

The Tennessee Regulatory Authority has received and acted upon numerous applications filed by other competing local exchange carriers and has granted those applications without their demonstrating any ability to comply with statutory requirements other than those imposed by Tennessee Code Annotated § 65-4-201 and § 65-5-212. As Tennessee Code Annotated § 7-52-401 subjects the

Electric Power Board to regulation by the Tennessee Regulatory Authority "in the same manner and to the same extent as other certificated providers of telecommunications services," the Electric Power Board should not be required to demonstrate compliance with Tennessee Code Annotated § 7-52-401, *et seq.*, prior to consideration of its Application. The Electric Power Board respectfully submits that any additional regulatory requirements for the Application that are imposed solely upon the Electric Power Board as a municipal electric system would be contrary to the plain language of Tennessee Code Annotated § 7-52-401.

C. A Rule-making Procedure is Not Necessary to Determine Compliance Pursuant to Tennessee Code Annotated § 7-52-401 et seq.

The third issue the Hearing Officer obtained from the intervenors concerns whether a rule-making proceeding is necessary either before or after considering the Electric Power Board's Application. The Electric Power Board submits that for many of the same reasons set forth in Section B. above, a rule-making procedure is neither necessary nor authorized to determine compliance pursuant to Tennessee Code Annotated § 7-52-401, *et seq.*

The Municipal Electric Act of 1997 neither authorizes nor suggests that the Tennessee Regulatory Authority should adopt any rules or regulations for municipal systems applying for telecommunications authority. The statute states the contrary. It certainly would be inappropriate to include any rule-making in this adjudicative proceeding. *See, Tennessee Cable Television Assoc. v. Public Service Commission*, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

The sections cited under this issue concern regulatory accounting requirements imposed by the Municipal Electric Act of 1997, and, therefore, relate solely to the rates of telecommunications services provided by municipal electric systems. For example, although the franchise requirements of the City of Chattanooga would not apply to the Electric Power Board's own provision of telecommunications service, Tennessee Code Annotated § 7-52-405(2) requires that the Electric Power Board's telecommunications rate base impute such costs. The General Assembly has also required that the Electric Power Board impute other costs in its rate base. *See, e.g.,* Tennessee Code Annotated § 7-52-402 (addressing dedicated portion of the electric plant and loans of funds); Tennessee Code Annotated § 7-52-404 (addressing a reasonable determination of the state, local, and federal taxes which would be required if the Electric Power Board were not a governmental entity, although the Electric Power Board will actually make payments in lieu of taxes, which may be a different number); Tennessee Code Annotated § 7-52-405(1) (addressing pole attachments).

Clearly, a rule-making proceeding is neither necessary nor appropriate either before or after considering the Electric Power Board's application. For the Authority to promulgate special rules applicable to municipal electric systems would be in violation of § 7-52-401.

CONCLUSION

For the foregoing reasons, the Electric Power Board respectfully submits that it is not subject to the requirements of

Tennessee Code Annotated § 65-5-208(c), that prior to obtaining its Certificate of Convenience and Necessity it should not be required to demonstrate compliance with Tennessee Code Annotated § 7-52-401, *et seq.*, and that a rule-making proceeding imposing special rules on the Electric Power Board and other municipal electric systems is not appropriate and would violate § 7-52-401 as well as the General Assembly's policy to open the local telecommunications market to competition.

The Electric Power Board requests that in compliance with the telecommunications policy adopted by the General Assembly and the specific provisions of Tennessee Code Annotated § 7-52-401, the Tennessee Regulatory Authority grant its Application for a Certificate of Convenience and Necessity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and exact copy of the within and foregoing pleading on behalf of the Electric Power Board of Chattanooga, via United States mail, first class postage prepared and properly addressed to the following:

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This 12th day of March, 1998.



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